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Public Prosecutor v Mohd Fazelan bin Md Khuzeh

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO D-05(S)-77–03 OF 2015
AZIAH ALI, AHMADI ASNAWI AND PRASAD ABRAHAM JJCA
12 OCTOBER 2015

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Criminal Law — Dangerous drugs — s 12(2) — Possession of 960.01g of methamphetamine — Prosecution appealing against inadequacy of sentence — Charge of trafficking reduced to possession — Respondent pleading guilty to reduced charge — Dangerous drugs found inside respondent's car — Whether sentence of eight years' imprisonment and ten strokes of whipping inadequate — Whether weight of drugs rendered immaterial in determining sentence due to reduced charge

D

Criminal Procedure — Charge — Reduction of — Charge of drug trafficking reduced to possession under s 12(2) of the Dangerous Drugs Act 1952 — Prerogative of public prosecutor to choose appropriate charge — Whether weight of drugs rendered immaterial in determining sentence due to reduced charge

E

Criminal Procedure — Sentencing — Drug possession — Whether sentences manifestly inadequate — Respondent pleading guilty to reduced charge of possession under s 12(2) of the Dangerous Drugs Act 1952 — Whether sentence of eight years' imprisonment and ten strokes of whipping inadequate — Sentencing policies in offences involving dangerous drugs — Sentence of imprisonment enhanced to 15 years

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The respondent was first charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') for trafficking in 960.01g of methamphetamine. The prosecution had then preferred an alternative charge under s 12(2) of the DDA for possession of 960.01g of methamphetamine. The respondent pleaded guilty to the alternative charge. The trial judge sentenced the appellant to eight years' imprisonment from the date of arrest and ten strokes of whipping. The public prosecutor appealed against the inadequacy of the sentence. During a raid at a tyre shop, the respondent was seen running away and throwing a bunch of keys towards a pile of tyres. The respondent was later arrested and had led the police to a motorcar which was opened using the keys which the respondent had earlier thrown away. The drugs were recovered in a bag inside the car and were wrapped in newspaper. The trial judge ('judge') had disagreed with the prosecution that based on the

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weight of the drugs, the sentence of imprisonment ought not to be less than half of the maximum term specified because, according to His Lordship, the prosecution should not have offered the alternative charge. According to the judge, when the prosecution decided to offer the alternative charge, the prosecution had chosen the safer route to get a conviction, so the weight of the drugs was rendered immaterial.

Held, allowing the appeal:

(1) It is trite that if the same set of facts gives rise to a distinct offence under more than one provision of a particular law or, under more than one law, it is the prerogative of the public prosecutor to elect, at his option, to frame a charge under whichever provision of the law that he, in his wisdom, deems appropriate. There was nothing in the notes of evidence to support the trial judge's views regarding the prosecution of this case. The judge's views and/or comments were pure conjecture and unwarranted (see para 8).

(2) The drugs recovered by the police contained methamphetamine with a net weight of 960.01g, which was almost one kilogram. Even though the respondent had no record of previous conviction, the judge had failed to give due consideration to the weight of the methamphetamine. It would be reasonable to assume that based on the amount and the manner the drugs were packaged in small plastic packets, that the drugs could not have been intended for the respondent's personal consumption. Further the respondent had attempted to evade the police and had thrown away the car and house keys when the police raided the tyre shop. His conduct showed a guilty mind (see para 9).

(3) Offences involving dangerous drugs ought not to be treated lightly so as not to trivialise the gravity of such offences. Public interest is a paramount consideration. The fact that the respondent was a first offender or that he had pleaded guilty ought to be weighed against the facts of the case, the circumstances in the commission of the offence, the type of drugs involved and the weight of the drugs. Considering these matters, a sentence of 15 years' imprisonment from the date of arrest and ten strokes of whipping was appropriate (see paras 11–12).

[Bahasa Malaysia summary

Responden sebelumnya dituduh dengan kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') kerana mengedar methamphetamine sebanyak 960.01g. Pihak pendakwaan telah mengenakan tuduhan alternatif di bawah s 12(2) ADB untuk milikan methamphetamine sebanyak 960.01g. Responden mengaku bersalah kepada tuduhan alternatif. Hakim perbicaraan menjatuhkan hukuman penjara lapan tahun dari tarikh penangkapan dan sepuluh sebatan rotan. Pendakwa raya merayu terhadap hukuman yang tidak

mencukupi tersebut. Semasa penyerbuan di kedai tayar, responden dilihat berlari dan membuang segugus kunci ke arah longgokan tayar. Responden kemudiannya ditangkap dan telah membawa polis kepada kereta yang dibuka dengan menggunakan kunci yang sebelumnya dibuang oleh responden. Dadah tersebut dijumpai di dalam beg dalam kereta dan dibungkus dengan surat khabar. Hakim perbicaraan ('hakim') tidak bersetuju dengan pihak pendakwaan bahawa berdasarkan berat dadah tersebut, hukuman penjara patut kurang daripada setengah tempoh maksimum yang dinyatakan kerana, mengikut Yang Arif, pihak pendakwaan tidak patut menawarkan tuduhan alternatif. Mengikut hakim, apabila pihak pendakwaan memutuskan untuk menawarkan tuduhan alternatif, pihak pendakwaan telah memilih jalan yang lebih selamat untuk mendapatkan sabitan, dengan itu berat dadah tersebut menjadi tidak material.

Diputuskan, membenarkan rayuan:

(1) Adalah nyata bahawa jika set fakta yang sama membangkitkan kepada kesalahan yang berlainan di bawah lebih daripada satu peruntukan undang-undang tertentu atau, di bawah lebih daripada satu undang-undang, adalah prerogatif pihak pendakwaan untuk memilih, pada pilihannya, untuk merangka tuduhan di bawah apa-apa peruntukan undang-undang yang dia, dalam kearifannya menganggap wajar. Tidak terdapat apa-apa dalam nota keterangan untuk menyokong pandangan hakim perbicaraan berkenaan pendakwaan kes ini. Pandangan hakim dan/atau komen adalah tekaan tulen dan tidak wajar (lihat perenggan 8).

(2) Dadah yang diperolehi oleh polis mengandungi methamphetamine dengan berat bersih sebanyak 960.01g, yang mana hampir satu kilogram. Walaupun responden tidak mempunyai rekod sabitan terdahulu, hakim telah gagal untuk memberi pertimbangan wajar kepada berat methamphetamine tersebut. Ia adalah munasabah untuk menganggap bahawa berdasarkan jumlah dan cara dadah tersebut dibungkus dalam paket plastik kecil, dadah tersebut mungkin bukan diniatkan untuk penggunaan peribadi responden. Selanjutnya responden telah mencuba untuk mengelak daripada polis dan telah membuang kunci kereta dan rumah apabila polis menyerbu kedai tayar tersebut. Kelakuannya menunjukkan dia bersalah (lihat perenggan 9).

(3) Kesalahan melibatkan dadah berbahaya tidak patut dianggap ringan seperti mengecilkan keseriusan kesalahan sedemikian. Kepentingan awam adalah pertimbangan yang penting. Fakta bahawa responden adalah pesalah kali pertama atau dia telah mengaku bersalah patut ditimbang terhadap fakta kes tersebut, keadaan dalam perlakuan kesalahan, jenis dadah yang terlibat dan berat dadah tersebut. Mempertimbangkan perkara-perkara ini, hukuman penjara 15 tahun

dari tarikh penangkapan dan ten sebatan rotan adalah wajar (lihat perenggan 11–12).]

Notes

For cases on s 12(2), see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 269–277.
For cases on reduction of charge, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 1715-1718.
For cases on drug possession, see 5(3) *Mallal's Digest* (5th Ed, 2015) paras 4444–4449.

Cases referred to

PP v Dato' Waad bin Mansor [2005] 2 MLJ 101; [2005] 1 CLJ 421, FC (refd)
R v Sargent (1974) 60 Cr App R 74 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 39A(2), 39B(1)(a)
Evidence Act 1950 s 27

Appeal from: Criminal Trial No 45A-11–6 of 2014 (High Court, Kota Bharu)

Jasmee Hameeza bt Jaafar (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Ahmad Nizam bin Mohamed (Alias Ibrahim & Co) for the respondent.

Aziah Ali JCA:

[1] The respondent, Mohd Fazelan bin Md Khuzeh was first charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The prosecution had then preferred an alternative charge under s 12(2) punishable under s 39A(2) of the same Act for possession of 960.01g of methamphetamine in front of house at Lot 2087, Jalan Sultan Yahya Petra, Kampung Lundang, in the district of Kota Bharu in the state of Kelantan. The respondent pleaded guilty to the alternative charge.

[2] The trial judge sentenced the appellant to eight years' imprisonment from the date of arrest and ten strokes of whipping. The public prosecutor is dissatisfied with the sentence imposed, hence this appeal. We had allowed the appeal. We set aside the sentence of eight years' imprisonment and substituted it with imprisonment for 15 years effective from the date of arrest. We affirmed the sentence of ten strokes of whipping. We now give our reasons below.

FACTUAL BACKGROUND

[3] The facts of this case as presented by the prosecution (exh P3) and admitted by the respondent as correct are as follows. On 5 December 2013 at about 2.05pm the complainant, Insp Nor Badrul Hisham conducted a raid at a tyre shop. The respondent was seen running away and throwing a bunch of keys towards a pile of tyres. The respondent was arrested and the complainant recovered the keys that the respondent had thrown away.

[4] At about 10pm the same day, the respondent led the complainant and his personnel to a black coloured Honda Jazz motor car bearing the registration number WMK 9415 which was parked in front of a house at Lot 2087, Jalan Yahya Petra, Kampung Lundang, Kota Bharu. Investigations showed that this house was rented by the respondent and he was the sole occupant. The Honda Jazz car had been used by the respondent for a few months before his arrest.

[5] The respondent opened the said motor car using the keys that were recovered by the complainant. The respondent opened the right rear passenger door and showed a cloth bag bearing the words 'CHANEL' which was on the floor. The complainant opened the bag and found that it contained packages wrapped in newspaper. Upon opening one of the packages, the complainant found small plastic packets containing pills suspected to be drugs. The complainant seized the exhibits. The drugs recovered were sent to the chemist for analysis. The chemist confirmed that the drugs contained methamphetamine with a net weight of 960.01g (exh P5).

[6] Section 39A(2) of the Act provides for the punishment of imprisonment for life or for a term which shall not be less than five years, and with whipping of not less than ten strokes. Despite acknowledging the weight of the drugs, the trial judge imposed the sentence of imprisonment of eight years and ten strokes of whipping. In his written judgment, His Lordship had stated that if the weight of the drugs is the only factor to be considered, then a sentence of 18–20 years' imprisonment would be appropriate.

[7] His Lordship however, disagreed with the prosecution that based on the weight of the drugs, the sentence of imprisonment ought not to be less than half of the maximum term specified because, according to His Lordship, the prosecution should not have offered the alternative charge. According to the trial judge, when the prosecution decided to offer the alternative charge, the prosecution had chosen the safer route to get a conviction, so the weight of the drugs is rendered immaterial. His Lordship opined that the prosecution must have considered that, had the respondent claimed trial to the alternative charge, it would have been difficult for the prosecution to prove custody and control over the motor vehicle and the prosecution would have to rely on s 27 of the

Evidence Act 1950. The trial judge had stated that he noted that the respondent was arrested at about 2 pm but the investigating officer ('IO') only questioned the respondent at 9pm. This, according to His Lordship, showed that from the time the respondent was arrested, the IO had known where the drugs were. His Lordship had further stated in his judgment that when the respondent had pleaded guilty to the alternative charge and, with no previous conviction, the respondent could have expected that the sentence imposed would only be less than half the maximum provided.

OUR DECISION

[8] It is trite that if the same set of facts gives rise to a distinct offence under more than one provision of a particular law or, under more than one law, it is the prerogative of the public prosecutor to elect, at his option, to frame a charge under whichever provision of the law that he, in his wisdom, deems appropriate. We have perused the notes of proceedings and we found nothing in the notes to support the trial judge's views regarding the prosecution of this case. We are constrained to state that His Lordship's views and/or comments are pure conjecture and unwarranted.

[9] The drugs recovered by the police contained methamphetamine with a net weight of 960.01g, which was almost one kilogram. We agreed with the prosecution that even though the respondent had no record of previous conviction, the trial judge had failed to give due consideration to the weight of the methamphetamine. It would be reasonable to assume that based on the amount and the manner the drugs were packaged in small plastic packets, that the drugs could not have been intended for the respondent's personal consumption. Further the respondent had attempted to evade the police and had thrown away the car and house keys when the police raided the tyre shop. His conduct showed a guilty mind.

[10] Learned counsel had submitted that the appropriate term of imprisonment is ten years. The learned deputy public prosecutor had proposed a term of 16 years to life. With regard to the principles of sentencing, we refer to the case of *Public Prosecutor v Dato' Waad bin Mansor* [2005] 2 MLJ 101; [2005] 1 CLJ 421 (FC), wherein Alauddin Mohd Sheriff FCJ (as he then was) in his judgment referred to the judgment of Lawton LJ in *R v Sargent* (1974) 60 Cr App R 74 as follows:

> *Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.*
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> I will start with retribution. The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our Criminal Law. There is, however,

> another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion ...

[11] We were of the view that offences involving dangerous drugs ought not to be treated lightly so as not to trivialise the gravity of such offences. Public interest is a paramount consideration. The fact that the respondent is a first offender or that he had pleaded guilty ought to be weighed against the facts of the case, the circumstances in the commission of the offence, the type of drugs involved and the weight of the drugs.

[12] Having considered the matters stated above, we were of the view that a sentence of 15 years' imprisonment from the date of arrest is appropriate. We affirmed the sentence of ten strokes of whipping.

Appeal allowed.

Reported by Kanesh Sundrum